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No. 856

IN THE

Supreme Court of the United States

OCTOBER TERM .....

WILLIAM H. JEFFERSON,

Petitioner,

v.

TAIYO KAIUN K. K., ET AL.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In The

Supreme Court of the United States

October Term .....

William H. Jefferson,

Petitioner,

v.

Taiyo Kaiun K. K., et al.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

William H. Jefferson prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

I.

OPINIONS BELOW

No written opinion was rendered by the United States District Court for the Southern District of Texas, Galveston Division. The judgment of the trial court is printed in the Appendix (App. 1a). The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 310 F. 2d 582 (App. 3a).

II.

JURISDICTION

The opinion of the Fifth Circuit was handed down on November 28, 1962.

The jurisdiction of this Court is conferred by 28 U.S.C.A. Sec. 1254.

III.

QUESTION PRESENTED

Is the flooring in the hold of a vessel unseaworthy as a matter of law, if it caves in during the course of ordinary and customary use?

IV.

STATEMENT OF THE CASE

Petitioner is a longshoreman. On January 31, 1959, he and other longshoremen were dispatched to the Number 5 Hatch of the SS TAITEX MARU for the purpose of loading the vessel with cargo. The men first loaded the after end of the Number 5 upper hold with sacks of flour, and then they proceed to the forward end of the Number 5 lower hold (R. 24, 150, 177). Upon entering the lower hold, the longshoremen found already stowed a layer or tier of barrels with a dunnage flooring laid out on the barrels (R. 28-30, 175). The evidence is somewhat in conflict as to whether the dunnage was laid as a solid flooring or whether it was laid in strips (R. 107, 152, 181); but, at all events, the witnesses agreed that the dunnage completely covered all the openings between the barrels (R. 105, 152, 180). Since the longshoremen were necessarily required to work on top of the dunnage, using it as flooring, several of them, including Petitioner, examined the dunnage to determine that it

was sturdy and properly laid. In so doing, they did not pick up and inspect each and every piece of dunnage, but the flooring looked to them as if it was safe to work on, even though the dunnage was old and appeared worn (R. 31-32, 173, 179).

A cotton gang is usually composed of fifteen men; two operate finger-lifts, bringing cotton from the warehouse to the ship side; two are used as hook on men who put a sling around the cotton and make it fast; two are winch operators; one of the gang acts as a signal man; and eight work in the hold of the vessel. The eight men in the hold are separated into two groups; four work on the offshore side of the vessel, and four on the inshore side. After the cotton is lowered into the hold, the inshore gang releases the sling, generally holding three bales, and, by rolling the bales to the proper place, the men stow the cotton on the inshore side of the vessel. While this is done, another sling of three bales is lowered into the hold, and these, in turn, are stowed by the four men working the offshore side of the vessel.

On the day in question, Petitioner was a member of the gang working the off-shore side of the Number 5 lower hold. The second sling of cotton was stowed without incident, but while Petitioner's gang was stowing the fourth or sixth sling of cotton and while Petitioner was "cutting" a bale (directing its roll toward the area where it was to be stowed), a piece of dunnage on which Petitioner stepped suddenly and unexpectedly broke and caved in. Petitioner's right leg was caused to go through the flooring, in between an excessive opening between barrels, and the bale of cotton fell over on him, injuring his back and leg (R. 36, 152, 184).

After Petitioner was freed, the broken piece of dunnage was examined by several of the longshoremen and found to have a large knothole in it at the place where it broke

(R. 154, 186). This piece of dunnage was replaced, and the remaining longshoremen finished loading the hold (R. 166). Petitioner was relieved from working in the hold, and he finished his time as a winch operator. And since that time, Petitioner's injuries have prevented his return to full time longshore work.

The above facts are established by the testimony of Petitioner and two disinterested witnesses called by him at the trial.

In addition, Petitioner's witnesses testified without contradiction that the purpose of dunnage like that which broke is (1) to separate layers of cargo and (2) to provide a flooring for the longshoremen to work upon (R. 34, 106, 117, 128, 159-160, 181-182). Further it is unchallenged that Petitioner was engaged in the proper and customary performance of his job when the flooring broke and caved in (R. 124-125, 140-141). To be sure, not only Petitioner's weight but also some portion of the weight of the bale of cotton (a bale weighs between 500 and 750 pounds) was on the piece of dunnage when it gave way; however, the evidence makes clear that there is no way to stow cargo of this type except for the longshoremen to roll the bale along the floor and to occasionally "coil" the bale for direction and necessarily the longshoremen and the flooring will always be bearing some portion of the weight of the bale.

Finally, it is undisputed that the dunnage flooring on top of the barrels was already laid when the longshoremen went down into the Number 5 lower hold. That is, these longshoremen were supplied by the shipowner with dunnage in place, i.e., flooring.

The Respondent shipowner offered no defense in this case; rather it strenously contended that the flooring had not caved in and that Petitioner had been injured when

he slipped and fell for no apparent reason. To this end, it introduced evidence that Petitioner had not told the time keeper that he was injured by the breaking of a dunnage board. This done, the shipowner rested its case.

The controversy was submitted to the jury on special interrogatories. The first inquiry was whether the facts were as testified to by Petitioner and his disinterested witnesses, or whether the Respondent was correct in its assertion that nothing done by it had caused Petitioner's injury. Thus, the jury was asked whether Petitioner had been injured by reason of the breaking of a dunnage board. The jury found that the facts were as stated by Petitioner.

The second interrogatory propounded to the jury inquired whether the piece of dunnage which broke was unseaworthy. To this, the jury responded that the board was seaworthy, and, on this finding, judgment was entered for Respondent.

It has been Petitioner's position throughout this litigation that the piece of dunnage flooring was unseaworthy as a matter of law, since the evidence was undisputed and uncontradicted that the board had caved in while being put to ordinary and customary use. This precise point was raised by Petitioner in his motion for directed verdict (R. 236-237) (App. 6a) and motion for judgment n.o.v., (R. 350) (App. 7a) before the Trial Court, and was Petitioner's sole point of error in the Court of Appeals (App. 9a). Jurisdiction of the trial court is grounded on diversity of citizenship.

V.

REASONS RELIED ON FOR GRANTING THE WRIT

This petition raises a question of substantial importance in regard to this much litigated area of the maritime law.

Indeed, the decisions of the two lower courts in this case have effectively eradicated the prior pronouncements of this Court in *Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96 (1944) and *Alaska S.S. Co.* v. *Petterson*, 347 U.S. 396 (1954), affirming *per curiam*, *Petterson* v. *Alaska S.S. Co.*, 205 F. 2d 478 (9th Cir. 1953). The point here presented was specifically ruled on in the *Mahnich* case. There a staging rope broke while being put to ordinary use, causing Mahnich to fall and be injured. Both lower courts had found no unseaworthiness on the theory that good rope had been available for use and that this was the extent of the shipowner's obligation. The Court deemed this an erroneous view of the law. But rather than reverse and remand for a new trial, the Court decided the unseaworthiness question as a matter of law:

> "After the accident, examination of the rope at the point where it broke showed that it was so rotten as to be inadequate to support the strain imposed upon it. * * * The staging from which petitioner fell was an appliance appurtenant to the ship. *It was unseaworthy in the sense that it was inadequate for the purpose for which it was ordinarily used*, because of the defective rope with which it was rigged. *Its inadequacy rendered it unseaworthy*, whether the mate's failure to observe the defect was negligent or unavoidable. Had it been adequate, petitioner would not have been injured and his injury was the proximate and immediate consequence of the unseaworthiness." 321 U.S. at 103 (Emphasis added).

In *Alaska S.S. Co.* v. *Petterson*, the District Court had made a finding that a block which had been brought on board the vessel by longshoremen was not unseaworthy, even though it had broken while being put to ordinary use. The Ninth Circuit reversed the lower Court's legal deter-

mination that the shipowner was not responsible for equipment not supplied by it, but the appellate court did not remand the case for a new trial; it, as this Court had done in the *Mahnich* case, decided the unseaworthiness issue:

> "The owner contends that as there was no proof of the unseaworthiness of the block, Petterson cannot recover. The Court below found that the block was used 'in a customary and usual manner' and that it was 'of a type ordinarily and customarily used and proper for the use to which it was being put upon the occasion in question. * * * If the block was being put to a proper use in a proper manner * * * it is a logical inference that it would not have broken unless it was defective — that is, unless it was unseaworthy." 205 F. 2d 479.

And judgment was entered for the Libellant." Certiorari was granted, and the decision expressly affirmed, 347 U.S. 396 (1954).

The books abound with authorities demonstrating and adhering to these decisions. See, e.g., *Blanco* v. *Phoenix Co.*, 304 F. 2d 13, 14 n. 3 (4th Cir. 1962) (Defective boom pin; summary judgment for seaman affirmed); *Van Carpals* v. *THE SS AMERICAN HARVESTER*, 297 F. 2d 9 (2nd Cir. 1961) (Defective valve; court reversed a finding by the judge of seaworthiness); *Vega* v. *Maluda*, 291 F. 2d 415, 419-20 (5th Cir. 1961) (Defective block; a case of "patent unseaworthiness"); *Wing* v. *Rockport S.S. Co.*, 1962 A.M.C. 2601, 2603-04 (W.D. Mich. 1962) (Defective boom; instructed verdict on unseaworthiness should have been given); *Cashon* v. *Stockard S.S. Co.*, 173 F. Supp. 845, 849 (E.D. La. 1957) (Defective boards; unseaworthy).

So too here, the dunnage was defective and thus unseaworthy.

Perhaps the determinative question is whether it makes a difference that a jury has found the board to be sea-

worthy. Petitioner respectfully urges that it does not, and should not, make a difference. The function of the jury in our jurisprudence is to act as the fact-finder. Where the facts are in dispute, the jury is charged with the responsibility of resolving the controversy. However, it has never been thought that the jury can disregard the undisputed and unimpeached testimony of disinterested witnesses, or that it can find facts that are wholly unsupported by any evidence. But this is exactly what the jury had to do here in order to conclude that the board was seaworthy. This Court has expressly ruled that undisputed evidence may entitled a Plaintiff to an instructed verdict. *Delaware, L. & W. R. R. v. Converse*, 139 U.S. 469 (1891). The matter is summed up by the Supreme Court of South Dakota as follows:

> "The positive testimony of disinterested, uncontradicted witnesses cannot be arbitrarily or capriciously disregarded by the jury." *Jerke v. Delmont State Bank*, 54 S.D. 446, 223 N.W. 585 (1929).

See also, 9 Wigmore, Evidence, Sec. 2495 (3rd ed. 1940).

The Court of Appeals summarily disposed of this case by saying that there was a view of the evidence which supported the jury's finding. However, the court did not say what that view was. Indeed, it is respectfully submitted that the Court of Appeals could not have found such a view of the evidence, even if it had tried.

Respondent, apparently relies solely on the fact that there is evidence that some of the dunnage in the lower hold of its vessel was only a quarter inch thick and, therefore, not suitable to walk on. It concludes from this that dunnage is not meant to be walked on and that this is a rational explanation of the jury's finding. However, the

assertion overlooks two factors. First, it is not disputed by the shipowner that the dunnage board which broke was of the thicker variety and intended to be walked on. And second, since there was no way to stow the cotton without walking on the flooring, the shipowner was charged absolutely with the duty to supply a flooring suitable for that purpose. E.g., *Mesle* v. *Key S.S. Corp.*, 260 F. 2d 747, 750 (3rd Cir. 1958); *Poignant* v. *U. S.*, 225 F. 2d 595 (2nd Cir. 1954); *Thompson* v. *Erie R.R.*, 1962 A.M.C. 2605, 2615, 33 Misc. 2d 514, 227 N.Y.S. 2d 80 (1962). Consequently, by supplying quarter inch dunnage, the shipowner merely magnified its default.

The shipowner's *real* contention in this case has been that the holdings of this Court in *Mitchell* v. *The Trawler Racer, Inc.*, 362 U.S. 539 (1960) and *Morales* v. *City of Galveston*, 370 U.S. 165 (1962), are calculated to make every question of unseaworthiness one for the jury. It argues that a defective appliance of a vessel may give way during ordinary use and yet be seaworthy, if a jury finds it so. Petitioner can only say that such an argument lies in the teeth of this Court's specific holding in the *Mahnich* case.

Finally, the shipowner has made the vague contention that the jury's finding of seaworthiness may be predicated on the idea that the board would not have broken if the barrels underneath had been properly stowed snug up to one another. This is no doubt true. But it is also true that the shipowner did not simply supply dunnage boards to Petitioner and the other longshoremen; rather, the shipowner, or its servants or agents, undertook to provide Petitioner's gang with flooring, i.e., dunnage in place over the barrel-stow as it existed, not as it should have existed. The dunnage floor over the existing barrel stow as supplied to the Petitioner and his gang was warranted by the Respondent to be then and there seaworthy for the intended and

necessary purpose of walking and standing on it in loading cotton. In other words, the dunnage board in the floor that broke was intended and warranted to be suitable as a part of the floor on the barrel-stow as that stow existed under the flooring. It was not suitable. That the dunnage board might have been adequate and suitable under some other hypothetical fact situation is not at issue here. For example, if a ship's hull, built of defective wood, caved in from the force of a calm sea or the force of an ordinary storm, would the argument that the hull would not have caved in had the ribs of the ship been spaced closer together defeat a claim of unseaworthiness? Certainly not. Likewise, if a staging rope breaks during ordinary use, it is irrelevant that the rope would not have broken had the strain on it been less, and the rope is nonetheless unseaworthy.

The injustice in this case cries out for correction.

CONCLUSION

For the foregoing reasons this Petition for Certiorari should be granted.

MANDELL & WRIGHT

By .....
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CERTIFICATE OF SERVICE

This is to certify that on the ..... day of ....., 1963, a true and correct copy of the foregoing was served upon Messrs. Baker, Botts, Shepherd & Coates, Esperson Building, Houston, Texas, and Royston, Razor and Cook, San Jacinto Building, Houston, Texas, Attorneys for ....., by placing the same in envelopes addressed to each of them, postage prepaid, by certified mail, return receipt requested, and deposited in the United States mails.

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